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OPINION NUMBER 2002-3

DATE: April 22, 2002

SUBJECT: Use of the Environmental Growth Fund for MAD Formation Costs

REQUESTED BY: Terri Williams, Deputy Director, Special Services Division,
Park and Recreation Department

PREPARED BY: City Attorney

QUESTION PRESENTED

May the City's Environmental Growth Fund be used to pay the cost of an assessment engineer study necessary for and prior to the formation of a maintenance assessment district [MAD] where there is no guarantee that the MAD will be established?

SHORT ANSWER

Yes, provided that: (1) the MAD is actually formed; (2) the purpose of the MAD is to maintain open space lands or park facilities; and (3) the costs can be allocated from the one-third portion of the Environmental Growth Fund that is not dedicated to debt service on bonds and open space acquisition.

BACKGROUND

In 1971, the City Council established the Special Environmental Growth Fund to be used for purchasing, improving, and maintaining open space for parks and recreational purposes. San Diego Ordinance O-10575 (May 6, 1971). In 1972, the electorate adopted a ballot measure to add the Environmental Growth Fund [Fund] to the City Charter [Charter] as section 103.1a. Twenty-five percent of the franchise fees paid by San Diego Gas and Electric Company are paid into the Fund. *See* 1989 City Att'y MOL 69. The Fund is in the nature of a trust fund, and the constraints

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upon its use as set forth in the Charter are binding on the City Council. *City of Long Beach v. Morse*, 31 Cal.2d 254, 257-258 (1947); 1987 Op. City Att’y 6.

Charter section 103.1a specifically mandates that two-thirds of the monies in the Fund be used to service any outstanding open space bonds. Any money that is not needed for debt service on bonds, as well as the remaining one-third, shall be used “exclusively for the purpose of preserving and enhancing the environment of the City of San Diego in whatever manner is deemed appropriate by the City Council.”

San Diego Municipal Code section 63.30 further restricts and prioritizes the use of the Fund. It provides that monies within the two-thirds for servicing bonds that is not used for that purpose be accumulated and used only for open-space lands acquisition. San Diego Municipal Code [SDMC] § 63.30(a). The remaining one-third shall be used in accordance with the following priorities:

- (1) Open space maintenance, including litter removal and control;
- (2) Providing matching funds for acquiring open space in cooperation with other private or governmental entities;
- (3) Regional Park maintenance;
- (4) Any other purposes consistent with Charter section 103.1a.

The restrictions and priorities contained in SDMC section 63.30 are consistent with representations made in the ballot arguments for the 1972 election. The argument in favor of the Charter amendment described the Fund as a means to acquiring open space (“the acquisition of as many desirable parcels as possible, as early as possible”), and urged a yes vote “to insure the continued beautification of San Diego, additional open space and continuing improvement and maintenance of our present parks and recreational facilities . . .” The argument against the amendment opposed “denying the use of more than \$600,000 in annual revenues for any other purpose than purchase of open space.”

You have asked whether the Fund may be used to pay the cost of an assessment engineer study necessary for and prior to the formation of a MAD. You have indicated that there is no guarantee that the MAD will be established, and that if it is not established, the costs that have been expended on its formation, including the cost of the assessment engineer study, will be lost. You have also indicated that the estimated \$150,000 cost will be deposited into a revolving fund,

separate from the Fund. MADs established using the revolving fund monies would repay those monies to the revolving fund for future use.

ANALYSIS

As set forth in Charter section 103.1a and SDMC section 63.30, what is an appropriate use of the Fund depends upon the division of the annual income to the Fund for debt service and other uses. We assume for the sake of this opinion that the proposed funds for the MAD study would come from the one-third of the Fund's annual income not committed to debt service. If, in fact, one-third of the Fund's income for Fiscal Year 2003 is already committed to non-debt service uses, then the remaining two-thirds is limited to debt service and the acquisition of open space lands, and cannot be used for any other purpose. SDMC § 63.30(a).

Therefore, assuming that the proposed expenditure will come from the one-third of the income to the Fund that is not set aside for debt service, and assuming that sufficient funds exist in that one-third to cover the expense, the question is whether the cost of an assessment engineer study necessary for the formation of a MAD is an appropriate expense. Aside from the restriction on two-thirds of the fund, the language of Charter section 103.1a gives the Council broad discretion to decide what is an appropriate use of the Fund as long as that use preserves and enhances the environment. A MAD that is formed for the purpose of maintaining open space parkland or improving and maintaining parks and recreational facilities, fits squarely within the intent of Charter section 103.1a. A MAD formed for other purposes such as the installation or maintenance of hardscape medians, street lights, or street banners, or to fund neighborhood security patrols, would not be consistent with the intended use of the Fund.

Accordingly, monies from the Fund can be used for a MAD and its formation, when the MAD is used to maintain or improve open space parklands or parks and recreational facilities. However, if the MAD is not formed, then the money expended on up-front costs is lost, and does not serve to preserve or enhance the environment. Thus, Fund monies can be used to pay for costs incurred in forming the proposed MAD, but only if the MAD is actually formed.

This result is consistent with City Attorney Opinions regarding the use of the Capital Outlay Fund. Monies from the Capital Outlay Fund, created by Charter section 77, are restricted to "the acquisition, construction and completion of permanent public improvements." The City Attorney has consistently opined that the Capital Outlay Fund can be used to pay for certain administrative and planning needs that are a necessary and integral part of establishing the permanent improvement, but not if the project is abandoned. If the project is abandoned, the funds have not been used for a permanent public improvement. 1987 City Att'y Op. 46 (travel expenditure permissible where necessary for design and installation of permanent improvement);

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1975 City Att'y MOL 15 (cost of master plan as prerequisite to acquisition of park land from federal government was permissible); 1968 City Att'y Op. 146 (not permitted where project was abandoned; payments made must be reimbursed); 1961 City Att'y Op. 50 (engineering and appraisal costs are allowed if the project is actually built, but not otherwise). Likewise, in this instance, if costs are expended for the formation of a MAD that will for example, maintain open space, but the MAD is never formed, then the money has not been spent for the purpose of preserving and enhancing the environment.

CONCLUSION

Two-thirds of the income to the Fund in each fiscal year must be used for debt service on bonds and open space lands acquisition. The remaining one-third of the Fund must be used for the purpose of preserving and enhancing the environment, as determined by the City Council. This use may include paying costs for the formation of a MAD to maintain open space lands and park and recreational facilities, as long as the MAD is actually formed.

Respectfully submitted,

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City Attorney

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